UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of NORTHERN BERKSHIRE COMMUNITY SERVICES, INC., D/B/A SWEET BROOK TRANSITIONAL CARE & LIVING CENTERS Employer[1] and 1199 SERVICE EMPLOYEES INTERNATIONAL UNION, A/W UNITED HEALTHCARE WORKERS EAST Petitioner	Case 1-RC-22296
NORTHERN BERKSHIRE COMMUNITY SERVICES, INC., D/B/A SWEET BROOK TRANSITIONAL CARE & LIVING CENTERS and SODEXHO, INC. Joint Employers and 1199 SERVICE EMPLOYEES INTERNATIONAL UNION, A/W UNITED HEALTHCARE WORKERS EAST Petitioner	Case 1-RC-22299[2]

DECISION AND DIRECTION OF ELECTIONS[3]

[1] The name of the Employer appears as amended at the hearing.

[2] Case 1-RC-22299, which was consolidated at the hearing with Case 1-RC-22296, involves 22 dietary employees who are jointly employed by the Employer and Sodexho. On January 29, 2009, the parties to that petition signed an election agreement for the dietary unit, which is hereby approved. I shall order an election in that unit to be held on the same date, time, and place as the election in the unit found appropriate herein.

In this matter, 1199 Service Employees International Union, a/w United Healthcare Workers East (Union) seeks to represent certain employees[4] of Northern Berkshire Community Services, Inc., d/b/a Sweet Brook Transitional Care & Living Centers (Employer), including 30 staff nurses and three Lead Certified Nursing Assistants (CNAs). The Employer takes the position that the staff nurses must be excluded from the bargaining unit because they serve as charge nurses and exercise supervisory authority over CNAs and Unit Assistants (UAs). The Employer also contends that the lead CNAs must be excluded from the bargaining unit because of their supervisory authority over CNAs. The Union asserts that the staff nurses and lead CNAs are nonsupervisory employees who should be included in the unit.

I find, for the reasons set forth below, that the staff nurses and lead CNAs are nonsupervisory employees. Therefore, the petitioned-for unit is appropriate, and I shall direct an election in that unit.

The Employer's Operation

The Employer operates a 182-bed skilled nursing care facility in Williamstown, Massachusetts. The facility is divided into three unit sections, each providing a distinct set of services to residents. The Dorothy Hickey unit ("Hickey") provides short-term rehabilitation services to patients who have been discharged from hospitals but are not yet ready to resume their normal daily activities at home.[5] The Collier-Wright unit ("CW") is primarily a long-term care unit, with 42 beds for residents receiving services that include skilled nursing, personal care, occupational and physical therapy, recreation, and social services. Linden Court is an 80-bed

---

[3] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[4] The parties stipulated that the any appropriate unit would include the following classifications (subject to requirements about the inclusion of professional and non-professional employees in bargaining units): certified nursing assistants, activities assistants, couriers, receptionists, housekeeping employees, laundry employees, maintenance employees, material(s) management employees, MDS data entry employees, medical secretaries, medical records employees, unit assistants, occupational therapists, certified occupational therapy assistants, physical therapists, physical therapy assistants, social workers, transport employees, rehabilitation aides, and financial assistants employed by the Employer at its Williamstown, Massachusetts facility. The parties also agreed that any appropriate unit should exclude the activities director, director of finance, director of human resources, environmental services manager, facilities maintenance manager, medical director, director of admissions, director of nursing, assistant director of nursing, environmental assistant, MDS manager, MDS LPN, nursing scheduler, unit managers (both RN and LPN), weekend nurse manager, director of rehabilitation, director of social work, and the executive assistant, all other managers and confidential employees, and supervisors as defined by the Act.

[5] Among the patients receiving service on the Hickey unit are those who have undergone hip or knee replacement surgeries, and those who have suffered an acute episode, such as a heart attack or stroke.

Alzheimer's and dementia unit that is divided into two secure units: Baxter and Davis. Each unit is staffed 24 hours a day, seven days a week.

The units are staffed according to a schedule created weekly by a nurse scheduler, whom the parties stipulated should be excluded from any unit found appropriate. Typically, the units are staffed by unit managers,[6] nurses, CNAs, UAs, and a medical secretary, although not all those classifications are present on all units on every shift. The nursing staff typically works three traditional shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m.[7]

The Nursing Department

Director of Nursing (DON) Cindy Dix oversees the nursing operation throughout the facility, and reports to administrator Susan Gancarz. Dix' regular work hours are 8 a.m. to 4 p.m., Monday through Friday. Reporting to Dix are two assistant directors of nursing (ADON), one of whom functions as director of admissions, and the hour unit managers. Additionally, four nursing managers and three nursing supervisors, all of whom are stipulated 2(11) supervisors, report to Dix.

Currently, only the Baxter and CW units have unit managers. During the day shift, Linda Sherman is the unit manager on Baxter, and Linda Card is the unit manager on CW. When there is no unit manager in the facility, a nursing supervisor is typically the highest ranking nursing department employee in the facility. Three nursing supervisors cover the facility from 3 to 11 p.m. on Monday through Friday; from 11 p.m. to 7 a.m. on Sunday through Wednesday; and from 7 p.m. through 7 a.m. on Friday and Saturday. On Thursday nights, Sunday evenings, and weekend days shifts, when there is no unit manager or nursing supervisor in the facility, the charge nurses are the highest ranking nursing employees on site.[8] When problems arise during those times that charge nurses cannot handle on their own, they contact an on-call unit manager or the Director of Nursing.

In addition to the personnel described above, the Employer employs 30 staff nurses, including RNs and LPNs, 72 CNAs, and three lead CNAs. Staff nurses are expected to serve in the capacity of charge nurse as part of their regular job duties. CNAs and lead CNAs assist patients with bathing, grooming, feeding, skin and nail care, toileting, ambulation, and exercise.

As noted above, the units are staffed by nurses and CNAs, who perform most of the patient care duties. Additionally, each unit is staffed during the day by UAs, non-certified employees who perform such duties as delivering and picking up food trays, making patient beds, and answering patient call bells and alarms. In addition, the medical secretary arranges medical appointments for residents and performs certain clerical tasks related to patient care.[9]

---

[6] The unit managers are also referred to as nurse managers or nursing managers.

[7] Some employees work 12-hour shifts, and a few work shifts of less than eight hours. UAs staff the units from 7 a.m. to 8 p.m.

[8] Witnesses for both parties testified that nurse managers sometimes work as a charge nurse on shifts when there would not otherwise be a manager on site. In those circumstances, the nurse manager is the highest ranking Employer representative in the building.

[9] One of the medical secretaries also happens to be a certified phlebotomist, and therefore performs blood draws for the entire facility in addition to her clerical duties.

On each shift there is a designated charge nurse, which may be either an RN or an LPN. The charge nurse is not designated on the schedule created by the nurse scheduler, and receives no extra pay for the shifts on which she acts as charge nurse. Every nurse employed by the Employer is qualified to act as charge nurse.

Upon admission to the Employer's facility, each resident is assigned to a specific unit and bed by the admissions coordinator, and receives a care plan, which reflects the individualized services to be provided. The care plan is developed by members of the Employer's nursing management team, under the direction of the patient's treating physician. Care plans are modified frequently as residents' conditions change, based on input provided by doctors, nurses, therapists, and other providers involved in the patients' care.

SUPERVISORY STATUS OF THE STAFF NURSES

Facts pertaining to supervisory status

The Employer asserts that all staff nurses are statutory supervisors by virtue of their authority, when they serve as charge nurses: to assign CNAs to particular units, patients, and duties; to responsibly direct them; and to discipline employees.[10]

Authority to assign CNAs and UAs to tasks and to residents

Charge nurses have no role in assigning CNAs and UAs to a particular unit or group of patients. Unit assignments are made by the nursing scheduler, while patient assignments are made by unit managers.

For the day and evening shifts,[11] each unit is divided up into a set of rooms, with patients listed along with their daily needs and care plans. A group of rooms constitutes a single assignment for a CNA, regardless of the patients who are residing in those rooms or their level of acuity. The assignment sheets include instructions for each patient, reflecting the patient's needs. As the patient's needs change, the instructions are changed to reflect his or her increased or decreased abilities in performing self-care tasks. Occasionally, when patient needs cause an assignment sheet to become imbalanced so that a CNA has too heavy a caseload, a unit manager, after consultation with the charge nurses and CNAs, might move a patient to a different assignment sheet in the interest of fairness to the CNAs. The assignment sheets do not change on a day-to-day basis. Only when there is a permanent change in a patient's condition, or when a patient moves onto or off the unit, is the assignment sheet changed.

CNAs typically work on the same unit every day, with the exception of floaters, and care for the same group of patients on a day-to-day basis. When they arrive for their shift, they take their pre-printed assignment sheets, which include a list of rooms, residents, and tasks, and go about their daily routines with little input from charge nurses. When a CNA is temporarily assigned to float onto a unit, she is given an assignment sheet to care for certain residents.

---

[10] The Employer does not contend that the staff nurses have statutory authority to hire or recommend hiring; to fire or recommend firing; to reward employees, or to adjust grievances.

[11] Night shift CNAs do not have patient assignments. Because there are only two CNAs on a unit during overnight hours, they work together to care for each patient on the unit.

According to charge nurse Powers, the CNAs themselves determine to which residents the floating CNA will be assigned.

Notwithstanding the Employer's assertion that they must first obtain permission from their charge nurse, it appears that CNAs temporarily trade patients with each other without first obtaining permission. They are expected, however, to inform the nurse of any such trades.

Charge nurses have authority to temporarily transfer a CNA from one patient to another without receiving a manager's approval. Charge nurse Ann Powers testified that this has occurred when, for example, she noticed that a CNA was behind in her duties and one of her patients needed to be ready for an appointment. In such circumstances, the charge nurse would direct another CNA to care for the patient who needed to be dressed and groomed, and authorize a temporary trade to balance out the workload. Powers testified that she has never taken a CNA's qualifications or skills into account when making a patient assignment. Nevertheless, the Employer cited an example of Powers' temporary reassignment of a CNA to a patient whose daughter visited on certain days of the week and was very particular about the care she received. In the situation cited by the Employer, the resident's daughter liked to see her mother's room arranged in a particular way, and the CNA to whom the patient was reassigned was better suited to such detail.

In providing various treatments to patients, charge nurses frequently require the assistance of one or more CNA. When only one CNA is needed, the charge nurse typically uses the CNA assigned to the particular patient. When additional help is needed, such as occurs with combative or overweight patients, the charge nurse asks a second CNA for assistance. Charge nurse Powers testified that she selects CNAs for this purpose on the basis of proximity or availability, rather than on an assessment of the skills or abilities of the individual CNA.

Charge nurses lack authority to move CNAs from one unit in the facility to another. When a vacancy occurs during a shift, charge nurses contact the on-call manager for instructions. Charge nurse Powers testified that she would call another unit to send over a CNA only after being instructed to do so by a manager.

Charge nurses have limited authority to move UAs from one unit to another. The Employer's protocol, which was developed without input from charge nurses, mandates that the Baxter and Davis units have first priority on UAs when the units are shorthanded. When the protocol was announced, charge nurses on Baxter and Davis were authorized to call other units when they had no UAs, and to direct the charge nurses on those units to send them a UA. The system broke down, however, when some nurses refused to give up a UA unless they were ordered to do so by a manager or supervisor. As a result, UAs are not typically transferred on a temporary basis without authorization from a unit manager or scheduler.

DON Dix testified that charge nurses exercise independent judgment in selecting CNAs to accompany residents to appointments outside the facility, but charge nurse Powers testified that she has never assigned an employee to leave the unit. According to Powers, the nurse scheduler assigns CNAs to accompany residents to their medical and other appointments.

CNAs and UAs have two breaks a day. For the day shift, the first break occurs after residents finish breakfast, and the lunch break is taken at either 11:30 a.m. or 1 p.m.[12] Charge

[12] The lunch break corresponds to residents' lunch time, and is not set by charge nurses.

nurses are responsible for scheduling both breaks for the employees on their units. Despite this nominal responsibility, it appears that CNAs decide among themselves who will take morning break and lunch first, and who will be in the second group. If the unit is short-staffed, the CNAs take their breaks individually so that there is adequate staffing on the unit, but the charge nurse plays no role in determining when each individual takes her break.

Authority to assign CNAs to a time

As noted above, the nursing scheduler creates the work schedules to ensure nursing coverage on all three shifts. Charge nurses have no role in the creation of the weekly schedule.

CNAs who call in sick on the day shift speak with a unit manager or shift supervisor. Charge nurses have been instructed not to receive call-outs from CNAs, but to refer them to a supervisor or manager instead.[13] When there is no unit manager or shift supervisor on site, such as on Thursday nights, call-outs are directed to the charge nurse on the unit responsible for receiving calls that month.

DON Dix testified that charge nurses who receive call-outs are responsible for finding coverage for the absent employee. However, charge nurses testified that they have never been directed to do this, and that they have not in fact done so. Instead, when a charge nurse takes a call from an employee who is going to be absent, she reports it to a manager when the manager arrives or calls in. The manager then makes the necessary arrangements to replace the employee. Neither charge nurses nor managers can compel an employee to work overtime or to stay beyond the end of her shift, or to require an off-duty employee to report for work.

The Employer presented testimonial evidence of a single occasion on which an overnight charge nurse independently reassigned CNAs in order to ensure staff coverage after receiving call-outs from CNAs. DON Dix testified that in August 2008, charge nurse Lyn Cross reported having redistributed CNAs as needed without seeking approval from a manager or supervisor. However, Cross testified that she has never reassigned CNAs without a manager's approval, and the Employer did not cross-examine her on this issue. There was no testimony regarding any other instances of charge nurses temporarily reassigning CNAs without the approval of a manager or supervisor.

The Employer presented evidence indicating that charge nurses sometimes sign off on certain payroll forms. In particular, Powers and others have signed as supervisor for employees who have forgotten to punch in or out, so that the employee could be paid for the time. Powers testified that she is aware she is not supposed to do this, but that she does it as a favor to employees when they cannot find a manager or supervisor to sign the form. A few of those forms resulted in the payment of overtime pay to employees, although the purpose of having a supervisor sign the form is merely to verify that the employee actually worked the hours claimed.[14]

[13] Additionally, lead CAN Melina Gulotta, a former scheduler for the Employer, testified that she was unaware of any charge nurse making a reassignment without first obtaining approval from a supervisor or the scheduler.

[14] DON Dix acknowledged that employees must sign in and out using these forms when they work on a day for which they are not scheduled, such as when they are asked to cover for employees who are out sick. On those occasions, employees cannot swipe their time card because the Kronos system will reject

Authority to responsibly direct

Charge nurses have primary responsibility for executing the nursing care plans of the patients on their units. In this regard, they oversee the day-to-day nursing care provided by staff nurses and CNAs. Staff nurses, including charge nurses, spend the vast majority of their time distributing medication, administering treatments, checking patient vital signs, and documenting patient care.

At the beginning of each shift, the charge nurse receives a report from the previous shift's charge nurse concerning the status of each patient. She then passes the patient information on to the CNAs who will be providing care to the residents.[15] The charge nurse does not give instructions to CNAs, but merely relays any relevant patient information given to her during the shift report. CNAs may adjust their patient care duties on the basis of that information.

Throughout the shift, charge nurses give information, direction, and guidance to CNAs as needed. For example, if a patient's feeding needs have changed, the charge nurse will communicate that to the CNA, so that the CNA and others will know whether the patient needs total feeding assistance. Similarly, if a patient expresses a need to use the bathroom and requires assistance, the charge nurse might instruct the CNA to accompany the patient.[16] If a charge nurse observes that a patient has not been dressed according to the care plan in appropriate therapeutic footwear or garments, she typically discusses it directly with the CNA who dressed the patient, and asks the CNA to correct the problem.

Charge nurses verify that CNAs have completed their paperwork on a day-to-day basis, but do not independently check the paperwork for accuracy. At the beginning of each shift, CNAs perform "walking rounds" by checking the alarms and other safety precautions on each patient under their care and then signing off in a book indicating that they have done so. Charge nurses look at the book to ensure that walking rounds have been conducted, but do not independently verify this. Similarly, at the end of each shift, charge nurses ask the CNAs whether they have completed all their paperwork, and check the flow sheets, weight and shower sheets, and "bowel book" for each patient to ascertain that they have been completed. Although DON Dix testified that charge nurses are responsible for ensuring the accuracy of the paperwork, charge nurses asserted that they have never been directed to do so, and that they do not in fact check CNAs' documentation for accuracy, but only for timely completion.[17]

---

the swipe. Dix testified that some of the forms offered into evidence and signed by charge nurses appeared to fall into this category.

[15] During the day and evening shifts, the charge nurse relays the information informally as she encounters CNAs while moving around the unit checking on patients. On the night shift, the charge nurse gives the information to CNAs before they start their rounds.

[16] Charge nurse Powers testified that activities staff or even another CNA might inform the appropriate CNA when a patient requires toileting assistance.

[17] Additionally, the Employer introduced minutes from a January 2007 meeting for nurses and CNAs, in which nurses were reminded of their responsibility to ensure the completeness and accuracy of CNAs' paperwork on each shift. Nevertheless, two nurses testified that they do not do this, and that they have not been disciplined or otherwise criticized for avoiding this responsibility.

There is no evidence that a charge nurse has ever been disciplined or suffered other adverse consequences due to poor performance by a CNA or UA. Staff nurses are evaluated on their ability to "Direct[] CNAs in provision of care" and "Report[] problems/issues to supervisor." Additionally, the Employer presented several disciplinary records purporting to show that nurses have been disciplined for the actions of the CNAs they supervise. For example, in May 2007, charge nurse Elaine Baker received a warning for rudeness and insubordination with a unit manager. According to DON Dix, the discipline stemmed from two incidents in which Baker did not like the CNAs assigned to her, and failed to appropriately control her staff. In another example, charge nurse Candace Sacilowski was disciplined for taking items from another employee's purse. In the warning, she was reminded of her leadership role as a charge nurse. Finally, DON Dix testified that charge nurses Carolyn Shaw-Dushaney and Irene Chaffee received warnings because CNAs under them did not perform their duties.[18] Other than this anecdotal evidence of two incidents of accountability, there is no other evidence that charge nurses are held accountable for the mistakes or deficits of the CNAs or UAs, or rewarded for their achievements.[19]

Authority to discipline

As noted above, charge nurses have authority to counsel and correct CNAs and UAs in the day-to-day performance of their duties. Charge nurses have never been told they have authority to discipline CNAs or UAs. If problems warranting discipline arise on a unit, the charge nurse reports them to the unit manager or shift supervisor, making no recommendation regarding the discipline that should be imposed. When lesser problems arise, including personality conflicts, charge nurses discuss them with the CNAs or UAs involved, and resolve the problems informally.

The Employer produced a number of disciplinary records, all demonstrating that charge nurses are the first link in the disciplinary chain, and purporting to demonstrate that charge nurses have supervisory authority on that basis. For example, On October 25, 2008, charge nurse Barbara Oleskiewicz made a written report of two incidents of unprofessional conduct by the same CNA toward different patients. In conjunction with the written reports, Oleskiewicz spoke with evening manager Chris Collins and DON Dix, who conducted an independent investigation of the incidents and decided to suspend the CNA. There is no evidence indicating that Oleskiewicz had any role in investigating the incident, beyond her initial report, or in the decision to suspend the CNA. Ultimately, the CNA was terminated for verbally abusing patients. Dix testified that she asked Oleskiewicz whether the CNA could be salvaged, and Oleskiewicz recommended that she be terminated. Other than this one recommendation, the record is devoid of any disciplinary action taken upon the recommendation of a charge nurse.

[18] The Employer did not produce documentary evidence of these warnings, despite being asked to do so.

[19] The Employer asserts that staff nurses have been promoted on the basis of their ability to supervise CNAs. For example, staff nurse Kathy Languinard was offered a promotion because of her "overall direction and supervision of CNAs." However, no nurse has been rewarded on the basis of a CNA's performance.

Analysis of the supervisory issue regarding the Charge Nurses

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*[20]

The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children's Farm Home.*[21] The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care.*[22] The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*[23]

In *Oakwood Healthcare, Inc.*,[24] the Board recently refined its analysis of the terms "assign," "responsibly direct," and "independent judgment" in assessing supervisory status. The Board announced that it construes the term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. In the health care setting, the term "assign" encompasses the alleged supervisor's responsibility to assign nurses and aides to particular patients. *Id.*[25]

With respect to "responsible direction," the Board explained in *Oakwood* that, if a person has "men under him" and if that person decides which job shall be undertaken or who shall do it, that person is a supervisor, provided that the direction is both "responsible" and carried out with independent judgment. For direction to be "responsible," the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps. *Id.*[26]

---

[20] 273 NLRB 1677, 1689 (1985).

[21] 324 NLRB 61 (1997).

[22] 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[23] 308 NLRB 101, 102 (1992).

[24] 348 NLRB 686 (2006).

[25] 348 NLRB at 689.

[26] 348 NLRB at 691-692.

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. "[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.*[27] "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* The Board also stated that the degree of discretion exercised must rise above the "routine or clerical." *Id.*

As noted above, the Employer asserts that the staff nurses are statutory supervisors because, in their regular service as charge nurses, they have authority to assign CNAs and UAs to particular residents, tasks, and times; to responsibly direct them; and to discipline them. I find that the Employer has failed to meet its burden of demonstrating that the nurses are Section 2(11) supervisors.

Authority to assign CNAs to tasks and to residents

The Employer asserts that the charge nurses exercise independent judgment in making temporary patient assignments and reassignments, and in recommending permanent reassignments as needed. Additionally, the Employer contends that the daily assignment of tasks in response to patients' constantly changing needs requires the requisite independent judgment sufficient to confer supervisory status.

I find that the Employer has failed to demonstrate that the charge nurses possess statutory authority to assign CNAs and UAs to tasks or to residents. Daily assignments are dictated by fixed assignment sheets generated by the unit manager or shift supervisor. Charge nurses play no role in determining which CNAs will care for each patient on the unit, except in ad hoc, routine tasks where additional assistance is needed, and in temporary reassignments to balance out the workload. Such assignments do not require independent judgment where the CNAs all possess the same skills and training, and where the temporary reassignment of patients is made in the interest of fairness to employees. *Oakwood Healthcare*[28] (assignments made solely on the basis of equalizing workloads do not implicate independent judgment). Charge nurses do not take into account the relative skills of the CNAs, or the specific needs of the residents, but simply seek assistance from whatever CNA is available.

The example cited by the Employer does not require a different result. DON Dix testified about a charge nurse who temporarily reassigned a CNA because she was better suited to meet the rigorous demands of a patient's daughter. The daughter, who visited in a predictable pattern, was particular about how things were arranged in her mother's room, and the charge nurse felt that the CNA assigned to her was not careful enough to satisfy the family member. As a result, the charge nurse asked a different CNA to care for the resident on a day when the daughter was expected to visit, believing that the CNA would be more attentive to detail. Although the charge nurse did consider the relative abilities of the two CNAs, she did not exercise independent judgment in doing so. Instead, I find that assignment involved only a routine observation that

[27] 348 NLRB at 693.

[28] 348 NLRB at 693.

one employee is more fastidious than another. Moreover, such sporadic changes in assignments do not involve the supervisory exercise of independent judgment in the assignment of overall duties to the CNA.[29]

In these circumstances, the Employer has not met its burden of establishing that the charge nurses exercise independent judgment in assigning CNAs to tasks or to residents.

Authority to assign CNAs and UAs to a time

The Employer contends that the charge nurses have authority to call employees in to fill vacancies, to authorize overtime, and to authenticate payroll records, and are therefore statutory supervisors. Charge nurses have no role in determining which CNAs and UAs will work the day, evening, or night shifts, or in creating the weekly shift schedules. Notwithstanding the conclusory testimony of DON Dix, I find that charge nurses are not responsible for finding coverage when a CNA calls in sick. Charge nurses Powers and Cross, the only two staff nurses to testify at the hearing, emphasized that they have been directed to report call-outs to a supervisor or manager.[30]

Even if they did have authority to call employees in to fill shift vacancies, it is undisputed that charge nurses lack the authority to compel any employee to report to work early or stay beyond the end of her scheduled shift. *Franklin Hospital Medical Center*.[31] A putative supervisor who lacks the power to compel, rather than merely request employees to take a certain action, does not possess the requisite supervisory authority. *Golden Crest Healthcare*.[32]

Nor do charge nurses have authority to authorize overtime. The small number of personnel forms signed by charge nurses do not establish that they authorize overtime, or that they are supervisors. Rather, the nurse's signature on the form merely verifies that the employee worked the hours stated on the form.

Accordingly, I find that the Employer has failed to establish that the charge nurses have primary authority, on their own, to increase staffing, compel employees to work beyond their scheduled shifts, or authorize overtime.

Authority to responsibly direct

The Employer contends that the charge nurses responsibly direct the CNAs because they are "in charge" of them throughout the shift. In particular, the Employer asserts that charge

---

[29] *I.H.S. Acquisition No. 114, Inc.,* 350 NLRB 489, 489-490 (2007). For instance, in a manufacturing setting, lead persons who worked along side their crew members engaged in "direction" rather than assignment where they occasionally switched tasks among the employees, directed employees to ensure that projects were completed on a timely basis, and told replacements what jobs to perform and switched other employees' jobs accordingly. *Croft Metals,* 348 NLRB 717, 721-22 (2006).

[30] Thus, Dix' evidence is conclusory and in dispute and has not been established in view of the actual practice testified to by Powers and Cross. In any case, the two examples would be far too sporadic and isolated to constitute persuasive evidence of supervisory authority.

[31] 337 NLRB 826, 830 (2002).

[32] 348 NLRB 727, 729 (2006).

nurses responsibly direct CNAs by reviewing their paperwork, directing feeding assignments, assuming a command role during disasters, assigning tasks, and assigning CNAs to accompany patients to medical appointments. I find, for the reasons set forth below, that none of these duties constitutes responsible direction. In this regard, I note that the charge nurse has the authority to instruct a CNA to complete a task that she failed to do, or to direct a CNA if in the charge nurse's judgment a resident appears to need attention – duties that are already within the scope of an CNA's daily functions by virtue of the assignment sheets passed out at the beginning of each shift.

To constitute "responsible" direction under *Oakwood Healthcare*, the person performing the oversight must be held accountable for the performance of the tasks such that some adverse consequence will befall them if the employees fail to perform their jobs properly. I find that the Employer has not met the *Oakwood Healthcare* requirement of establishing that there is a prospect of adverse consequences for the charge nurses if the CNAs perform poorly.

The Employer contends that the nurses are held accountable for the work of the CNAs in that they are rated in their evaluations on their ability to supervise the CNAs. To demonstrate accountability, the Board requires that the putative supervisors be held accountable for the performance of their subordinates, not just for their own performance. *Oakwood Healthcare*[33] (evidence that the employer disciplined a charge nurse for failing to make fair assignments shows that charge nurses are accountable for their *own* performance or lack thereof, not the performance of *others*)(emphasis in the original). While their ability to supervise the CNAs is undoubtedly considered by the manager conducting the evaluations, there is little on the appraisal form calling for a rating in this area.[34] Moreover, even if the charge nurses are judged on their ability to oversee the CNAs, this factor is too ambiguous to conclude that the charge nurses are held accountable for the performance of the CNAs rather than for their own performance. Further, because there is no direct correlation between the charge nurses' evaluations and their salary increases, the Employer has failed to demonstrate that they face a prospect of any adverse consequence due to poor performance by the CNAs.

The examples offered by the Employer do not require a different result. The warnings to nurses Baker and Sacilowski are primarily because of their own conduct. Dix' testimony, without documentation, that two nurses had received warnings because CNAs did not perform their duties is too vague and unspecific upon which to base a finding of supervisory status for the entire classification.[35]

Similarly, there is no evidence that charge nurses are rewarded on the basis of CNAs' performance. That nurses have been promoted, in part, because of their leadership skills does not establish that they are being rewarded for the performance of the CNAs, but only for their own performance.

---

[33] 348 NLRB 686, 692 (2006).

[34] Moreover, the item on the appraisal form rating charge nurses on their ability to "direct" the CNAs also rates them on whether they report problems to their supervisor.

[35] Even if documentation had been presented to specify and verify the accuracy of the circumstances of these two incidents, they are too isolated and sporadic to constitute evidence of supervisory status for the entire nursing staff. Two incidents in a facility of this size, in a context where the Employer is contending that each of the 30 staff nurses possesses and exercises this authority over 72 CNAs on a 24/7/365 basis, in far too few in number upon which to rely for a finding of supervisory status.

Because the Employer has failed to establish the element of accountability, I need not reach the issue of whether the charge nurses exercise independent judgment in directing the CNAs.

Authority to discipline

It is undisputed that charge nurses do not issue written warnings, suspend employee, or terminate employees.[36] Nevertheless, the Employer asserts that the charge nurses have authority to discipline employees because they are the first link in the disciplinary chain. Additionally, the Employer contends that charge nurses have, on occasion, effectively recommended discipline or termination, and are therefore statutory supervisors.

Documentary evidence produced by the Employer indicates that charge nurses have a reportorial role in the disciplinary process. Reports written by charge nurses may become part of the employees' personnel file, but do not constitute written discipline, and make no recommendation regarding discipline. Unit managers, shift supervisors, the DON, and the ADON mete out discipline to nurses and CNAs, with no involvement of charge nurses beyond the initial report. Such a reportorial role does not establish supervisory authority where they do not always lead to discipline and where they do not contain disciplinary recommendations. *Franklin Hospital Medical Center.*[37] For instance, the incident report prepared by nurse Oleskiewicz, relied upon by the Employer, was subject to an independent investigation by Dix before action was taken against the employee.

Likewise, a charge nurse's duty to correct CNAs in the performance of their patient care duties and counsel them in the proper way to perform them does not support the Employer's position. The power to "point out and correct deficiencies" in an employee's work does not confer supervisory authority. *Franklin Hospital Medical Center.*[38]

Accordingly, I find that the nurses' role in reporting behavioral and performance issues to their supervisors is insufficient to confer supervisory status.

Secondary Indicia

The Employer argues that the fact that charge nurses are sometimes the highest ranking officials in the facility supports a finding that they are statutory supervisors. Although this would buttress a finding of supervisory authority,[39] such secondary indicia are insufficient by themselves to establish supervisory status in the absence of evidence that an individual possesses any one of the several primary Section 2(11) indicia. *Ken-Crest Services*.[40]

---

[36] DON Dix testified that charge nurses have authority to issue written warnings, but this assertion was not supported by any documentary evidence, and was contradicted by the testimony of charge nurses Powers and Cross.

[37] 337 NLRB at 830.

[38] Id. at 830, citing *Crittenton Hospital*, 328 NLRB at 879.

[39] *St. Francis Medical Center-West,* 323 NLRB 1046, 1047-1048 (1997).

[40] 335 NLRB 777, 779 (2001).

Accordingly, I find that the Employer has failed to meet its burden of proving the charge nurses' 2(11) status, and I conclude that they are nonsupervisory employees.

SUPERVISORY STATUS OF THE LEAD CNAs

Facts pertaining to supervisory status

The Employer asserts that three lead CNAs must be excluded from the bargaining unit because they responsibly direct the other CNAs.[41]

In July 2008, the Employer created a lead CNA position and promoted three of its CNAs to the new position.[42] Currently, the Employer has lead CNAs on three patient care units, during the day shift only. Following their promotion, the lead CNAs were trained in leadership skills, conflict resolution, and group dynamics, described by DON Dix as how to talk to CNAs diplomatically about their assignments and "how to provide guidance without being intimidating."

The function of the lead CNA, as described in Employer documents, is to ensure that CNAs perform their patient care duties and complete their paperwork properly. Lead CNA Melinda Gulotta, who works from 7 a.m. to 3 p.m. on Baxter, testified that her duties have changed little, if at all, since the promotion. Gulotta continues to spend the majority of her work day caring for her assigned patients and completing the required paperwork. The number and type of patient assignments is no different for lead CNAs than for other CNAs. The only new responsibility lead CNAs have been given is to ensure that CNAs complete their paperwork. Gulotta testified that the CNAs all sit together to complete their paperwork at the end of the shift, and that she observes the CNAs in this way as she has always done. Beyond this observation, she does not review the paperwork either for completeness or accuracy, and has not been instructed to do so.

Gulotta testified that, in carrying out her patient care duties throughout the day, she frequently asks for assistance from other CNAs, as she did before the promotion. She does not take CNAs' relative skills or abilities into account, but simply asks the first CNA she finds.

As part of her regular duties, Gulotta routinely corrects and instructs other CNAs regarding proper techniques for performing various patient care tasks. According to Gulotta, this is no different, either qualitatively or quantitatively, than when she was a regular CNA. Nor is it any different from the kind of ongoing instruction given to CNAs by nurses or other CNAs.

Lead CNAs have never been disciplined due to poor performance by the other CNAs. Although the lead CNAs were selected, in part, on the basis of their potential leadership skills, there is no evidence that they are held accountable for the mistakes or deficits of the CNAs, or

[41] The Employer does not take the position that the lead CNAs have authority to hire or recommend hiring, fire or recommend firing, assign, discipline or reward employees, or adjust grievances.

[42] DON Dix testified that the position was created in response to input from residents' family members, who felt that some CNAs required additional guidance.

rewarded for their achievements. Because the position was created less than a year ago, no lead CN A has yet been evaluated in that position. Lead CNAs earn $1 an hour more than other CNAs.

Analysis of the supervisory issue regarding the Lead CNAs

The Employer takes the position that the lead CNAs are statutory supervisors because they are in charge of the other CNAs and therefore responsibly direct them. Given the lack of evidence that the lead CNAs have ever directed an employee in any regard, and that they have ever been held accountable for the work of the other CNAs, I find that they do not possess statutory authority to responsibly direct employees.

In creating the lead CNA position, the Employer anticipated that she would oversee the work of less experienced CNAs and ensure that patient care documentation was being performed timely, completely, and accurately. In reality, however, the lead CNAs continue to perform the same duties that they performed before their promotions. Their patient assignments have remained unchanged, so that the vast majority of their day is comprised of patient care duties and completing their own paperwork. If they observe a CNA performing a task incorrectly, they are expected to instruct her in the proper method, something they did before the promotion to lead CNA. To the extent they observe CNAs completing their paperwork, it is only because they all fill out their sheets in the same room at the same time. Otherwise, the lead CNAs do not actually provide any oversight of the other CNAs, and do not direct their work.

As discussed above, in order to constitute "responsible" direction under *Oakwood Healthcare*, the person performing the oversight must be held accountable for the performance of the tasks such that some adverse consequence will befall them if the employees fail to perform their jobs properly. I find that the Employer has not met the *Oakwood Healthcare* requirement of establishing that there is a prospect of adverse consequences for the lead CNAs if the other CNAs perform poorly.

There is no evidence that any lead CNA has been disciplined for the poor performance of another CNA. Nor is there any evidence that lead CNAs have been warned to expect this. Although lead CNAs were selected and may eventually be evaluated, in part, on the basis of their ability to direct the CNAs on their units, the Board requires that the putative supervisors be held accountable for the performance of their subordinates, not just for their own performance. *Oakwood Healthcare.*[43]

Because the Employer has failed to establish the element of accountability, I need not reach the issue of whether the charge nurses exercise independent judgment in directing the CNAs.

The Employer argues that the $1 an hour wage increase that accompanied the promotion to lead CNA supports a finding that they are statutory supervisors. As noted above, secondary indicia such as this are insufficient by themselves to establish supervisory status in the absence of evidence that an individual possesses any one of the several primary Section 2(11) indicia. *Ken-Crest Services*.[44]

[43] 348 NLRB 686, 692 (2006).

[44] 335 NLRB 777, 779 (2001).

Accordingly, I find that the Employer has failed to meet its burden of proving the lead CNAs' 2(11) status, and I conclude that they are nonsupervisory employees.

CONCLUSION AS TO CASE 1-RC-22296

The parties stipulated that the RNs, occupation therapists (OTs) physical therapists (PTs), and social workers are professional employees. In view of the statutory requirement that the Board may not join professional and non-professional employees in a single unit without the desires of the professional employees being determined in a separate vote, I shall, pursuant to the Board's decision in *Sonotone Corp*.,[45] direct separate elections in voting groups 1 and 2. The employees in group 1, the professional employees, will be asked the following two questions on their ballots:

1. Do you desire to be included in the same unit as non-professional employees employed by the Employer for the purposes of collective bargaining?

2. Do you desire to be represented for the purposes of collective bargaining by 1199 Service Employees International Union, a/w United Healthcare Workers East?

If a majority of the professional employees in voting group 1 vote yes to the first question, indicating their desire to be included in a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted with the votes of the non-professional employees in voting group 2 to decide the representative for the combined bargaining unit. If, on the other hand, a majority of the professional employees in voting group 1 do not vote for inclusion, they will not be included with the non-professional employees and their votes on the second question will be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

The ultimate determination as to the appropriate unit or units is based upon the result of the election. However, I make the following findings with regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in a unit with non-professional employees, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time staff nurses (RN and LPN), certified nursing assistants, lead certified nursing assistants, activities assistants, couriers, receptionists, housekeeping employees, laundry employees, maintenance employees, material(s) management employees, MDS data entry employees, medical secretaries, medical records employees, unit assistants, occupational therapists, certified occupational therapy assistants, physical therapists, physical therapy assistants, social workers, transport employees, rehabilitation aides, and financial assistants employed by the Employer at its Williamstown, Massachusetts facility, excluding the activities director, director of finance, director of human resources, environmental services manager, facilities maintenance manager, medical director, director of admissions, director of nursing, assistant director of nursing, environmental assistant, MDS manager, MDS LPN, nursing

[45] 90 NLRB 1236 (1950). The appropriateness of the *Sonotone* procedure was reaffirmed by the Board in *Pratt & Whitney*, 327 NLRB 1213, 1217-18 (1999).

scheduler, unit managers (both RN and LPN), weekend nurse manager, director of rehabilitation, director of social work, and the executive assistant, all other managers and confidential employees, and supervisors as defined by the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with the non-professional employees, I find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT 1:

All full-time and regular part-time registered nurses, occupational therapists, physical therapists, and social workers employed by the Employer at its Williamstown, Massachusetts facility; excluding all licensed practical nurses, certified nursing assistants, lead certified nursing assistants, activities assistants, couriers, receptionists, housekeeping employees, laundry employees, maintenance employees, material(s) management employees, MDS data entry employees, medical secretaries, medical records employees, unit assistants, certified occupational therapy assistants, physical therapy assistants, transport employees, rehabilitation aides, financial assistants, the activities director, director of finance, director of human resources, environmental services manager, facilities maintenance manager, medical director, director of admissions, director of nursing, assistant director of nursing, environmental assistant, MDS manager, MDS LPN, nursing scheduler, unit managers (both RN and LPN), weekend nurse manager, director of rehabilitation, director of social work, and the executive assistant, all other managers and confidential employees, and supervisors as defined by the Act.

UNIT 2:

All full-time and regular part-time licensed practical nurses, certified nursing assistants, lead certified nursing assistants, activities assistants, couriers, receptionists, housekeeping employees, laundry employees, maintenance employees, material(s) management employees, MDS data entry employees, medical secretaries, medical records employees, unit assistants, certified occupational therapy assistants, physical therapy assistants, transport employees, rehabilitation aides, and financial assistants employed by the Employer at its Williamstown, Massachusetts facility; but excluding all registered nurses, occupational therapists, physical therapists, social workers, the activities director, director of finance, director of human resources, environmental services manager, facilities maintenance manager, medical director, director of admissions, director of nursing, assistant director of nursing, environmental assistant, MDS manager, MDS LPN, nursing scheduler, unit managers (both RN and LPN), weekend nurse manager, director of rehabilitation, director of social work, and the executive assistant, all other managers and confidential employees, and supervisors as defined by the Act.

CASE 1-RC-22299

In accord with the stipulation of the parties and the record as a whole, I find that the following employees of the Employer constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time cooks and dietary employees, including per diem employees who work an average of at least four hours per week in the 90 days preceding the eligibility date of the election, employed by the Joint Employer in its food services operations located at Williamstown, Massachusetts, but excluding casual employees, temporary employees, all other employees, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTIONS

Separate elections by secret ballot shall be conducted by the Regional Director among the employees in the voting groups/units found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups/units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the elections and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by 1199 Service Employees International Union, a/w United Healthcare Workers East.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the elections should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*;[46] *NLRB v. Wyman-Gordon Co.*[47] Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters in each voting group/unit, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.[48] In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before March 4, 2009. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

[46] 156 NLRB 1236 (1966).

[47] 394 U.S. 759 (1969).

[48] 315 NLRB 359 (1994).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must by received by the Board in Washington by March 11, 2009

In the Regional Office's original correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 25th day of February 2009